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No. 84-570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOAN RANCE VUYANICH, *et al.*,
Petitioners,

v.

REPUBLIC NATIONAL BANK OF DALLAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Republic National Bank of Dallas, respondent herein, submits this opposition to the Petition For Writ Of Certiorari submitted in this proceeding. Respondent does not challenge petitioners' assertions under the headings of Opinions Below, Jurisdiction, and Provisions Involved. Respondent does challenge petitioners' Statement of the Case in that it omits relevant facts and conclusions critical to an understanding of the decision below. Respondent submits the following Statement to supplement petitioners' Statement.[1]

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[1] Pursuant to Rule 28.1 of this Court, respondent has appended to this Brief In Opposition a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondent.

STATEMENT OF THE CASE

A. The EEOC Charges And Judicial Complaints

This case arose from individual EEOC charges brought by two black females. The first, filed on August 13, 1969 by petitioner Vuyanich, alleged race discrimination in involuntary termination from employment. Pet. App. 397a-398a.[2] The second charge, filed on October 15, 1971 by petitioner Johnson, complained that respondent failed to hire her because of her race and sex. Ms. Johnson, who never was employed at respondent, also made broad allegations of race and sex discrimination in almost all of respondent's employment policies. Pet. App. 48a.

In 1973, after EEOC determinations, petitioners filed separate class action complaints in the district court; together, petitioners alleged race and sex discrimination in hiring, initial assignment, promotion, transfer, compensation, maternity leave, and termination practices of respondent, for applicants as well as exempt and nonexempt employees.[3]

B. The Class Certifications

On November 7, 1974 the district court conditionally certified the class alleged by petitioner Vuyanich. On March 15, 1978, after a two-day hearing on the cer-

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[2] For the convenience of the Court, citations to decisions below are made herein to the appropriate pages of the Petition For Writ Of Certiorari. As petitioners note (Pet. 1), the opinion of the court of appeals is reported at 723 F.2d 1195, and the denial of the petition for rehearing appears at 736 F.2d 160. The district court opinions pertinent to the Petition and respondent's Brief In Opposition are reported at 505 F. Supp. 224; 82 F.R.D. 420; 78 F.R.D. 352; and 409 F. Supp. 1083.

[3] As used herein and in the opinions below, the terms "exempt" and "nonexempt" refer to employees who are either exempt (*i.e.*, professionals, supervisors, etc.) or nonexempt from the overtime requirements of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1982).

tification issue, the district court consolidated the cases and made petitioners joint representatives of a class of all blacks and female employees and applicants since February 16, 1969. Pet. App. 388a-396a. The district court relied upon the Fifth Circuit's across-the-board approach in certifying the class. Pet. App. 394a-395a. The certification was reaffirmed on April 25, 1979, with the class divided into five subclasses. Pet. App. 359a-387a. Again, the district court specifically based the rationale for its certification upon the across-the-board approach to certifying broad Title VII classes. Pet. App. 373a.

C. Determination At Trial

On October 22, 1980, after a lengthy trial, the district court reaffirmed its class determination. Pet. App. 52a-60a. Although recognizing that *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) had "called into question" the "continuing propriety of across-the-board class actions under Title VII," it held that Fifth Circuit decisions such as *Falcon v. General Telephone Co. of the Southwest*,[4] required continued adherence to the across-the-board approach. Pet. App. 53a-58a.

After a lengthy recitation of the relevant evidence, the district court found liability in some years on some of petitioners' class claims. Petitioners were not required by the district court to present the merits of their individual cases at the trial on the merits. Pet. App. 66a.

D. The Court Of Appeals Decision

The Fifth Circuit vacated the underlying class certification order, finding that the decision in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147

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[4] 626 F.2d 369 (5th Cir. 1980), *vacated*, 450 U.S. 1036, *judgment reinstated*, 647 F.2d 633 (5th Cir. 1981), *reversed and remanded*, 457 U.S. 147 (1982).

(1982), issued after the district court's opinion, had rejected the across-the-board approach relied upon by the district court. Pet. App. 5a-6a. The Circuit concluded that the class determination was improper under *Falcon* because the named plaintiffs, who possessed only limited claims of discrimination, were permitted under the district court's standard to litigate a "full-scale attack on every employment practice of a major metropolitan bank." Pet. App. 6a-10a. The Circuit concluded:

> This extension of the litigation to claims the named plaintiffs could not raise not only violates rudimentary principles of typicality, commonality and standing but also creates such a legion of claims and defenses that sheer volume tends to obscure the valid rights of the proper classes and such rights as the members of improperly joined classes may be able to assert in another action.

Pet. App. 9a-10a. The Circuit vacated the certification and remanded to the district court for reconsideration of the limited class claims of plaintiffs Vuyanich (race discrimination in terminations of nonexempt employees) and Johnson (sex discrimination in the hiring of exempt employees). All other class claims were dismissed. Pet. App. 6a, 9a, 11a-12a.

REASONS FOR DENYING THE WRIT

The decision of the Fifth Circuit below provides no basis for the grant of certiorari. The Circuit's opinion assiduously applied the principles of this Court's determination in *Falcon* to correct a district court class certification that had expressly utilized the same analytical flaws exposed as improper by *Falcon*. The Circuit Court's repudiation of the faulty standards upon which the district court's class determination was premised, and its application of the legal standard prescribed in *Falcon* connote no absence of appropriate deference to the lower court's determination. Moreover, the Circuit's ruling on

class certification is not in conflict with the decisions of any other circuit court: petitioners' claims of conflict are based entirely on their mischaracterizations of the Fifth Circuit's determination in this proceeding and on their misreading of the decisions of other circuits. Consequently, the assertions made by petitioners in actuality amount to nothing more than disagreement with the Circuit's assessment of the sufficiency of the record evidence as applied to the proper legal standards dictated by *Falcon*, and as such raise no issue worthy of Supreme Court review.

A. The Fifth Circuit's Decision Is Fully Consistent With And Compelled By This Court's Determination in *Falcon*.

Petitioners contend that the Fifth Circuit's holding below is inconsistent with this Court's decision in *Falcon*. To put this contention in perspective, it is essential first to recognize the extent to which reversal of the district court's certification was compelled by *Falcon*.

This Court's decision in *Falcon* specifically rejected the Fifth Circuit's longstanding across-the-board approach to Title VII class certification. The Court in *Falcon* reasoned that the essential requirement in a class certification determination is a rigorous analysis of the Rule 23(a) prerequisites to determine whether considerations affecting the class "are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." 457 U.S. at 160. The Court concluded that the "error inherent in the across-the-board rule" was the replacement of that rigorous analysis with a presumption that commonality and typicality accompany contentions of discrimination among members of the same protected class. The Court emphasized what it had previously said in *Rodriguez*: "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." 457 U.S. at 156. Accord-

ingly, the Court declared that Title VII class actions, just like others, require rigorous application of the Rule 23(a) requirements to "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Id.* It rejected the across-the-board approach routinely applied by the Fifth Circuit for failing to do so.

The decision in *Falcon* was issued after the district court's final determination in this proceeding. In light of the *Falcon* holding, the Fifth Circuit was compelled to reverse the decision below since, as the Circuit properly held, "the district court relied on the across-the-board theory of class certification" and did not apply the principles mandated by *Falcon.* Pet. App. 5a-6a, 9a-10a. The failure of the district court to make the Rule 23 analysis required by *Falcon* is, as the Circuit concluded, patently obvious. First, the district court, contrary to *Falcon,* found irrelevant an inquiry into the factual and legal issues implicated by the plaintiffs' claims of injury. In fact, it permitted the certification proceedings and the trial on the merits to proceed to completion without either plaintiff trying the merits of her individual case. Pet. App. 66a. It concluded that plaintiffs' claims simply were "of discrimination," and that the manner in which the "discrimination may have manifested itself" was not relevant to a typicality inquiry. Pet. App. 372a. The district court's disregard for the specific claims of the plaintiffs in favor of a presumption that all discrimination claims are fungible is the very opposite of the particularized typicality and commonality mandated by *Falcon.*

Second, the district court made no attempt to ascertain whether the claims asserted by Plaintiffs Vuyanich and Johnson on behalf of the putative class were "fairly encompassed by the named plaintiff's claims." Indeed, the district court expressly declared it to be unnecessary, at either the class certification stage or a Phase I trial, even to identify what specific employment practices af-

fected the named plaintiffs. Pet. App. 393a. Thus, it assumed that a claim of race or sex discrimination regarding one employment practice necessarily encompassed all claims directed against practices allegedly discriminatory on the basis of race or sex:

> In this case, then, the common question of fact is whether the defendant bank engaged in discrimination against blacks and women. That the discrimination may have manifested itself in a variety of contexts including, but not limited to, hiring, promotions, job classifications, training, and pay, does not detract from the commonality of the class members' and representatives' claims.
>
> * * * *
>
> The law does not mandate a holding that a plaintiff complaining of one employment practice cannot represent an employee complaining of a different practice.

Pet. App. 369a-370a, 373a. Such reasoning is diametrically opposed to that embraced by *Falcon*:

> [I]t is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

457 U.S. at 159 n.15 (emphasis in original).[5]

Recognizing that these analytical failures were inconsistent with the requirements of *Falcon*, the Fifth Cir-

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[5] The district court also expressed its view that certification in a Title VII context required a liberal application of Rule 23 to effectuate the "broad remedial" legislative purposes embodied in Title VII (Pet. App. 366a-367a, 373a). *Falcon* specifically rejected this view, holding that "Title VII . . . contains no special authorization for class suits maintained by private parties." 457 U.S. at 156.

cuit determined that the two named plaintiffs had very limited personal claims—plaintiff Vuyanich's only personal claim was that she had been terminated as a non-exempt employee because of her race, and plaintiff Johnson's only personal claim was that she had not been hired as an exempt employee because of her sex. Pet. App. 6a. The Circuit, applying *Falcon*, concluded that these claims were neither typical of nor common to class claims of discrimination in compensation, promotion, placement, and maternity, and that the district court's certification of these broader issues was therefore improper. Pet. App. 5a-6a.

Petitioners, in their argument here, avoid any reference to these analytical failings and boldly assert that the district court's certification analysis "correctly predicted this Court's decision" in *Falcon*. Pet. 22. This assertion is belied by the plain record recited above, and is flatly inconsistent with the circuit court's assessment of the evidence and its application of that evidence under *Falcon*. Petitioners' disagreement with the Circuit's evidentiary assessment and its application to the *Falcon* requirements does not raise an issue for this Court.

Petitioners also claim that the circuit court's decision "is inconsistent" with language in *Falcon* which provides a narrow evidentiary exception to the general rule that the class certification should be limited to the same employment practice as to which the plaintiff's injury occurs. That language provided as follows:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

457 U.S. at 159 n.15. Petitioners do not point to any legal basis for their claim of inconsistency between the

decision below and the above language from footnote 15. The petitioners raised this point before the circuit court, which concluded, upon review of petitioners' evidence, that the "proof was not present here" to fall within the exception. Pet. App. 7a. Petitioners' disagreement with the Circuit's determination on this point plainly raises only the sufficiency of their evidence, which is an insufficient basis on which to grant certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Nor do petitioners somehow show legal satisfaction of the evidentiary test of footnote 15 by their repeated references (Pet. 12-14) to the language in the district court's certification decision to the effect that certification evidence suggested a "common discriminatory animus." The district court made neither of the findings necessary for the application of footnote 15, *i.e.*, (1) the existence of a "general policy of discrimination" and (2) that such a policy was "manifested . . . in the same general fashion." The district court, in fact, specifically ruled that proof of the manifestation of discrimination in the same general fashion was irrelevant. Pet. App. 369a-370a. Moreover, the evidence relied upon by the district court for "common animus" was not competent evidence for such a conclusion: it was no more than raw workforce data, without calculations of statistical significance or controls for qualifications or availability, which merely showed uneven distributions of blacks and females in respondent's labor force. Pet. App. 390a-391a; Pet. App. 369a n.6. Such evidence is not "significant proof" of anything, and is precisely the sort of evidence that "leads only to the conclusion that no conclusion can be drawn from it." *Rivera v. City of Wichita Falls*, 665 F.2d 531, 542 (5th Cir. 1982). *Accord Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). Importantly, as noted above, petitioners' assertions regarding the sufficiency of such evidence for application under footnote 15 were raised at the appropriate level of

evidentiary review, and were specifically rejected as insufficient. Pet. App. 7a. No further evidentiary review is appropriate.[6]

B. The Decision Below Is Not In Conflict With The Decision Of Any Other Circuit Court

Petitioners contend that the decisions below in several respects conflicts with decisions of other circuits. We show below that no such conflict exists.

1. *Broad class actions.* Petitioners assert that contrary to the decision below other circuit courts permit a plaintiff to bring "class claims of across-the-board discrimination." Pet. 15. This assertion of conflict erroneously assumes that the Fifth Circuit rejected the general policy of discrimination exception set forth in footnote 15 of *Falcon*. Nothing in the opinion here leads to that interpretation: The opinion expressly discussed the applicability of the exception in footnote 15; it specifically cited two Fifth Circuit opinions which relied upon footnote 15 to "sustain . . . broad class actions," and explained that

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[6] Petitioners grossly exaggerate the Circuit's decision when they assert (Pet. 15) that the court "erred in holding that an employer's assertion that it used any objective criteria in its subjective hiring process was enough to preclude the existence of a general policy of discrimination." The Fifth Circuit did not so hold, and petitioners' characterization of the holding amounts to a misleading representation devoid of record support. First, the Circuit did not rely merely on "an employer's assertion" of objectivity; it relied upon the *district court's finding*, after the testimony of expert witnesses, that the employer's hiring methods were heavily influenced by objective considerations of experience and education. Pet. App. 7a, 338a. Second, the Fifth Circuit, in responding to petitioners' claim that an "entirely subjective decisionmaking process" justified the broad class certified by the district court, quite properly, in view of the dearth of evidence offered by petitioners on the subject, relied upon the employer's evidence of objective considerations in its hiring policy in refutation of this contention. In this light, petitioners' assertion (Pet. 12) that the Fifth Circuit's language "means in effect that across-the-board class actions will no longer be possible" appears considerably overdramatic.

the petitioners' proof was not sufficient to justify the exception in this case. Pet. App. 6a-8a. Plainly, the Circuit's opinion does not reject the applicability of the exception permitting broad class actions where a general policy of discrimination is shown to have manifested itself in the same general fashion across practice lines.[7]

In the same vein, petitioners reference a series of cases which they claim conflict with the Fifth Circuit's "holding that *Falcon* generally precludes a plaintiff from bringing on behalf of a class any claim other than precisely plaintiff's own." Pet. 15-17. Again, petitioners mischaracterize the Circuit's holding: the Circuit's citation and discussion of two post-*Falcon* cases "in which across-the-board class actions were upheld on appeal" belie petitioners' characterization of the panel's holding. Pet. App. 7a. Moreover, none of the cases cited by petitioners for the conflict are inconsistent with the principles enunciated in the opinion of the panel below.[8]

2. *Scope of Action.* Petitioners present a false issue in their contention that a conflict exists with the Circuit's holding "that Title VII precludes plaintiffs from asserting in a judicial complaint any claim other than the individual claim in their EEOC charge." Pet. 20. The court of appeals below did not so hold. It reversed the

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[7] Petitioners also appear to contend that a conflict may exist because the panel below limited across-the-board claims "to those where an employer used subjective criteria exclusively." Pet. at 15. As discussed *supra* at 10 n.6, the Circuit made no such holding.

[8] Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2154 (1984) (insufficient commonality and typicality to litigate both termination claims and promotion claims); McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) (promotions claims only); Freeman v. Motor Convoy, Inc., 700 F.2d 1339 (11th Cir. 1983) (employees cannot litigate claims of hiring discrimination); De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225 (7th Cir. 1983) (plaintiff and the class subject to same practices); Jordan v. County of Los Angeles, 713 F.2d 503 (9th Cir. 1983), *as amended*, 726 F.2d 1366 (1984) (*dicta*).

district court's class certification on the grounds that it "violates rudimentary principles of typicality, commonality, and standing." Pet. App. 10a. Although the court did take notice of the narrowness of plaintiff Vuyanich's EEOC complaint (Pet. App. 6a), its holding on the impropriety of Vuyanich's and Johnson's representation rested solely on the requirements of Article III and Fed. R. Civ. P. 23(a).

Moreover, petitioners are incorrect in their assertion that the issue of the relationship between the scope of a plaintiff's EEOC complaint and the breadth of a district court's jurisdiction over the plaintiff's subsequent lawsuit has created a conflict among the circuits. Both *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 928 (11th Cir. 1983) and *Eastland v. Tennessee Valley Authority*, 714 F.2d 1066, 1067 (11th Cir. 1983), *cert. denied sub nom. James v. Tennessee Valley Authority*, 104 S. Ct. 1415 (1984), which petitioners assert are in conflict with *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), cite *Sanchez* as controlling authority and follow the rule set forth in *Sanchez*.[9]

3. *Standing.* Petitioners contend that the Circuit's decision that plaintiffs had no standing to raise class claims arising from employment practices that did not affect them is "inconsistent with the traditional decisional law." Pet. 18. They cite no cases in support. Nor could they, because no inconsistency exists.

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[9] Ekanem v. Health & Hospital Corp., 724 F.2d 563 (7th Cir. 1983), *petition for cert. filed*, 53 U.S.L.W. 3016 (U.S. May 4, 1984) (No. 83-1805), is also not in conflict with *Sanchez*. The court in that case held that an employee whose EEOC charge did not include a claim of race discrimination could not provide the basis for certification of a class alleging a racially discriminatory compensation practice. The authority cited by the court on this point, however, embraced the rationale of *Sanchez* but found restrictions on the class scope were necessitated by Article III standing considerations. *See* Badillo v. Central Steel and Wire Co., 495 F. Supp. 299, 305 (N.D. Ill. 1980), *cited in Ekanem*, 724 F.2d at 573.

Petitioners assert that the authorities relied on by the Fifth Circuit—in holding that plaintiffs alleging injury from an employer's hiring and termination practices do not have standing to challenge such practices as compensation, promotion and placement, and maternity policies —"concerned not class representation but plaintiff's own standing to assert a claim for plaintiff." *Id.* As with several other representations made by petitioners, this one is simply false.

Blum v. Yaretsky, 457 U.S. 991 (1983), the principal decision of this Court relied on by the Fifth Circuit in the standing portion of its opinion below (Pet. App. 8a), was itself a class action (457 U.S. 933), and the crux of its holding is articulated in terms that manifestly pertain to the same sort of class representation question that arose in this case: [10]

> It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Pet. App. 8a-9a (quoting *Blum*, 457 U.S. at 999). The specific question at issue in *Blum* was whether a party

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[10] The language quoted in the opinion of the Fifth Circuit below from the other two Supreme Court standing cases also clearly pertains by its terms to the class action context. Warth v. Seldin, 442 U.S. 490, 502 (1975) (Named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."); O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (Unless named plaintiffs can establish the requisite case or controversy between themselves and the defendant "none may seek relief on behalf of himself or any other member of the class.").

whose Medicaid benefits had been reduced or terminated without notice and a hearing had standing to represent a class of persons whose levels of medical care had been increased, also without notice and a hearing. The standing portion of the Fifth Circuit's opinion in the present case merely reflected faithful adherence to this Court's teaching in *Blum* that a named plaintiff must have suffered injury *of the same kind* as that suffered by the class if he is to have standing to assume the role of class representative.[11]

C. The Fifth Circuit Accorded Appropriate Deference To The District Court's Findings.

Petitioners' contention that the Circuit used an insufficiently deferential level of review is inapposite. The Circuit did not overturn the district court's factual determinations, but instead overturned the district court's class certification decision because its certification standard was the product of a legal theory this Court had rejected in *Falcon*. Appellate reversal of legal error is plainly appropriate, and not subject to the clearly erroneous and abuse of discretion standards cited by petitioners. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

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[11] Nor is petitioners' position helped by their citations to this Court's cases holding that under some circumstances a named plaintiff, whose claim is mooted through the passage of time or otherwise, nevertheless may continue to represent the class of which he was a member. *See* Pet. 18-19. Such cases clearly are distinguishable for they involve a class representative who has in fact suffered the same injury as the class, but who simply no longer has a stake in the recovery that may be based on such injury.

CONCLUSION

For the foregoing reasons, respondent submits that no basis exists for granting the Petition For Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit and respectfully requests that the Petition be denied.

Respectfully submitted,

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Dated: November 9, 1984

APPENDIX

The following is a listing of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of respondent. This representation is made pursuant to Rule 28.1 of this Court.

Respondent RepublicBank Dallas (formerly Republic National Bank of Dallas) has as its parent holding company RepublicBank Corporation. Other member banks of the holding company are listed alphabetically as follows: National Bank of Fort Sam Houston (San Antonio), RepublicBank A&M (College Station), Republic Bank Austin, RepublicBank Barton Creek (Austin), RepublicBank Braes Bayou (Houston), RepublicBank Brownwood, RepublicBank Carrollton, RepublicBank Dallas East, RepublicBank Fort Worth East, RepublicBank Garland, RepublicBank Grand Prairie, RepublicBank Greenville Avenue (Dallas), RepublicBank Henderson, RepublicBank Houston, RepublicBank Kingwood (Houston), RepublicBank Las Colinas (Dallas), RepublicBank Lubbock, RepublicBank Lufkin, RepublicBank Medical Center (San Antonio), RepublicBank Midland, RepublicBank Mineral Wells, RepublicBank North Dallas, RepublicBank Northern Hills (San Antonio), RepublicBank Northwest Austin, RepublicBank Oak Cliff (Dallas), RepublicBank Plano, RepublicBank Post Oak (Houston), RepublicBank Richmond (Houston), RepublicBank Ridglea (Fort Worth), RepublicBank San Antonio, RepublicBank South Austin, RepublicBank Spring Branch (Houston), RepublicBank Tyler, RepublicBank Universal City (San Antonio), and RepublicBank Waco.

Inverfin, SA is the only subsidiary of respondent that is not wholly owned.